93-666

No. 93-474

Supreme Court, U.S.
FILED
OCT 22 1993
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Petitioner,

—v.—

MAHER TERMINALS, INC.,

Respondent/Cross-Petitioner,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in remanding a claim for Longshore Act workers' compensation benefits to the Administrative Law Judge to decide whether claimant's evidence satisfied the applicable preponderance of the evidence standard after the ALJ held that the evidence on the question of entitlement was "equally probative" and that the issue itself was ". . . still deemed to be debateable . . ."?

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OPINIONS BELOW[1]

This case involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Section 901-950 for disability and death of her late husband made by petitioner, Pasqualina Santoro. The administrative hearing resulted in a decision and order awarding benefits of Administrative Law Judge Aaron Silverman dated November 22, 1988, and a decision and order denying reconsideration dated December 15, 1988. The award of benefits was affirmed by the Benefits Review Board, United States Department of Labor, in an unpublished decision dated March 27, 1992. On April 19, 1993, The U.S. Court of Appeals for the Third Circuit reversed the benefits award and remanded the case to the Administrative Law Judge for further consideration. 992 F.2d 1277 (3rd Cir. 1993). Petitions for re-hearing submitted by the widow-claimant and Director of Office of Worker's Compensation Programs were denied by the court of appeals by decision filed June 25, 1993, ____ F.2d ____ (3rd Cir. 1993). On or about September 22, 1993 petitioner, Mrs. Santoro, but not the director, applied to this Court for writ of certiorari, the solicitor general asking for and being given extensions of time to petition until November 10, 1993 pending its decision whether or not to do so in this case. Respondent, which has sought an extension of time to respond to the petition of Mrs. Santoro until 30 days after the time extended to the solicitor general to act or not act on behalf of the director, cross-petitions within 30 days of the Santoro petition on account of the provision of Rule 19.5 of the Supreme Court Rules, that time for cross-petition "shall not be extended". It is not sufficient to rely on the fact that respondent might be able to cross-petition within 30 days of filing of a petition by the solicitor on

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[1] Pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States, the opinions below are not in an Appendix hereto. All references herein to the opinions are to the pages in the original Petition for Certiorari.

behalf of the director, because the solicitor general may decide not to seek a writ.

STATEMENT OF JURISDICTION

Jurisdiction of this Court exists pursuant to Section 28 U.S.C. 1254(1).

RELEVANT STATUTES

5 U.S.C. 556(d) Administrative Procedure Act (in relevant part) provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

33 U.S.C. 919(d) Longshore and Harbor Workers' Compensation Act:

> Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provision of Section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities, vested by this Act, on the date of the enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, in the deputy commissioners with respect to such hearing shall be vested in such hearing examiners.

STATEMENT OF THE CASE

This case concerns the validity of the "true doubt rule" that the department of labor insists applies in Section 919 hearings of disputed claims for benefits under the Longshore and Harbor Workers' Compensation Act, and which was applied in this claim for benefits—where quadriplegia occurred about three weeks after petitioner's decedent's injury during covered employment with Respondent Cross-Petitioner—on account of alleged hastened onset of disability and death resulting from cancer of the spinal cord. That rule provides that when evidence submitted by a claimant and the party opposing an award of benefits is of equal weight, the doubt is resolved in favor of the claimant. See *Mullins Coal Co.* v. *Director OWCP*, 484 U.S. 135, 144 n.12 (1987). The effect of the "true doubt rule" is to put the risk of non-persuasion on the party contesting entitlement. This rule was rejected by the court of appeals which held that the ultimate burden of persuasion, by preponderance of the evidence, is upon the claimant in any case where the Longshore Act Section 920(a) presumption has been rebutted and entitlement does not depend upon the employer's establishing an affirmative defense.

After a hearing before the ALJ, at which the question of cause of disability and death was solely at issue, upon extensive review of the evidence on the "causality" issue, the ALJ, in his November 22, 1988 decision, found: "The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the claimant" (A-44). Thereafter, cross-petitioner filed a petition to the ALJ for reconsideration, arguing that the rule of doubt was not properly applied by the ALJ in the November 22, 1988 decision. By decision dated December 15, 1988, the ALJ ruled: "It is believed that the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of

the Administrative Procedure Act . . . and [that] further consideration would serve no useful purpose" (A-46).

Cross-Petitioner served a timely petition for review pursuant to 33 U.S.C., Section 921(b)(3) to the Benefits Review Board invoking, among other things, the 5 U.S.C., Section 577(c)(3) requirement that an ALJ's decision include "findings . . . on record". In affirming the ALJ's award of benefits by decision issued March 27, 1992, the board held that the finder of fact had ". . . . determined that [the] employer had introduced evidence sufficient to rebut the presumed causal connection between decedent's condition and his employment and accordingly proceeded to weigh the record evidence regarding causation as a whole" (A-22). But the board—without basis in the ALJ's decision awarding benefits because "equally probative" is not the same as equally persuasive of truth of fact—also held that the ALJ: "[a]fter weighing the evidence and finding it to be in *equipoise* . . . applied the statutory policy that all doubtful questions of fact are to be resolved in favor of the injured employee" (emphasis added) (A-19). It did so despite the fact that the ALJ in his November 22, 1988 decision held that although the testimony of claimant's physician on the issue of medical causation had been "probative", the testimony of cross-petitioner's medical expert, ". . . provided a high level of persuasion"; and that ". . . there is some merit in the employer's position" that the expert medical opinion offered in support of work-relatedness ". . . is a gratuitous 'theory' to put the claimant's case in the best light" (A-40), the latter apparently on account of finding that the testimony on behalf of petitioner of deceased's treating surgeon had been "inconsistent or contradictory" (A-44).

Petitioner, Mrs. Santoro did not appeal from the Benefits Review Board decision and, instead, adopted as a basis of her opposition to respondent cross-petitioner's appeal to the third circuit that: ". . . a true doubt rule had controlled . . . [the ALJ's] . . . ultimate determination [to award benefits] but not his evaluation of the evidence or evidentiary

conclusions" (Brief and Appendix to the Third Circuit for Widow-Respondent, page 25). In sum, petitioner agreed that the ALJ had found that the evidence supporting her claim did *not* preponderate.

In spite of findings by the ALJ in two rulings, and the fact that determination that the evidence on the causation issue was *even* in "equipoise" was made not by the ALJ but the Benefits Review Board, the court of appeals remanded the claim to in order to have the ALJ consider whether the claimant's evidence on the causation issue satisfied the applicable preponderance of the evidence standard. The court of appeals stated at 992 F.2d. 1285:

> It is not clear, however, if the ALJ in this case ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard. It is possible that, upon reaching the point of equipoise, and believing the true doubt rule to be valid, the ALJ halted his inquiry short of deciding whether Mrs. Santoro's evidence preponderated.
>
> Accordingly, the order of the benefits Review Board will be vacated with directions to remand the case to the ALJ to make this determination. If the ALJ again concludes that the evidence is in equipoise, then Maher must prevail.

Cross-Petitioner argues that the order for remand for reconsideration of the evidence ignores the previous two decisions of the ALJ holding, after review of the evidence, that claimant's proof did *not* outweigh its proof on the dispositive issue of causation. The ALJ's holding that the "issue of causality is still deemed to debateable" (A-44) and that the evidence was "equally probative and conflicting" (A-46), according to respondent, precludes as a matter of law a finding upon remand that petitioner's evidence preponderated. Moreover, if the petition of Mrs. Santoro is granted cross-

petitioner will show that the ALJ rejected its proof opposing causality for reason *solely* of the alleged "humanitarian" policy of the Longshore Act; and also that the award of benefits was based upon the ALJ's doubt of the correctness of the opinion negating causality with which petitioner Santoro and respondent *agreed*—that physical trauma did not either cause or aggravate petitioner's decedent's cancer as a result of which he became disabled and died.

REASONS FOR GRANTING THE WRIT

1. The ALJ has twice held that claimant's evidence did not outweigh that of Respondent, Cross-Petitioner and the remand is, therefor, inappropriate.

2. The reason for the ALJ's dou ; and as a result of the "true doubt rule" the basis of his award of benefits, had to do with a claim which was not only made but denied by petitioner—that physical injury *can* cause cancer to grow or accelerate in growth, or change into a new and more malignant form. Nonetheless, it was for reason that *possibly* existed otherwise that ALJ concluded on the basis of "doubt" that injury might have hastened onset of disability and death, with the further result that respondent was found liable for Longshore Act benefits. To allow the ALJ to award benefits on some other basis after so determining appears in at least some conflict with this Court's holding in *U.S. Industries/Federal Sheet Metals Co., Inc. v. Director, OWCP*, 455 U.S. 608 (1982). Cross-Petitioner also asks that this Court exercise its power of supervision in order to abolish all possibility that an award of benefits might eventually be ordered despite the ALJ's two holdings and petitioner's agreement that the doubt rule was employed—not to resolve disputed particular questions of fact—but in order to award benefits because the proofs were *not better than in* "equipoise". Acceptance of an award of benefits in such circumstances would constitute a far departure from the accepted and usual course of judicial proceedings.

CONCLUSION

In the event Mrs. Santoro's petition is granted Cross-Petitioner requests that the Supreme Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit reversing the order of remand to the ALJ and dismissing petitioner's claim for workers' compensation benefits.

DATED: New York, New York
October 22, 1993

Respectfully submitted,

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